Rel: 10/21/2016

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2016-2017

CR-12-0197

Jessie Livell Phillips

v.

State of Alabama

Appeal from Marshall Circuit Court
(CC-09-596)

On Return to Remand

JOINER, Judge.

Jessie Livell Phillips appeals his conviction for one count of capital murder for causing the death of his wife, Erica Phillips ("Erica"), and their unborn child ("Baby Doe") during "one act or pursuant to one scheme or course of

conduct," see § 13A-5-40(a)(10), Ala. Code 1975. The jury unanimously recommended that Phillips be sentenced to death. After receiving a presentence-investigation report and conducting a judicial sentencing hearing, the trial court followed the jury's advisory recommendation and sentenced Phillips to death.

On December 18, 2015, this Court issued an opinion affirming Phillips's conviction but remanding the case to the trial court for that court to address certain defects in its sentencing order. Specifically, we instructed the trial court "to enter a new sentencing order that complies with § 13A-5-47(d), Ala. Code 1975, by making '"specific written findings concerning the existence or nonexistence of" the statutory and nonstatutory mitigating circumstances and the aggravating circumstances contributing to the trial court's determination of the sentence.' Ex parte Mitchell, 84 So. 3d [1013,] 1014 [(Ala. 2011)]." Phillips v. State, [Ms. CR-12-0197, Dec. 18, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). Because we remanded this case to the trial court to issue a new sentencing order, we also instructed that court to address other issues in its order--namely, correcting minor

factual errors and setting out the proper standard for weighing the aggravating circumstances and the mitigating circumstances.[1] Id. The trial court made return to this Court on March 9, 2016.

On remand, the trial court conducted another judicial sentencing hearing, at which Phillips, Phillips's counsel, and the State were present. During that hearing the parties addressed, among other things, the scope of this Court's remand instructions and what impact, if any, the United States Supreme Court's decision in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016), has on Phillips's case.

Thereafter, on February 12, 2016, the trial court read to Phillips its amended sentencing order. In its amended sentencing order, the trial court explained that the jury, by

[1]The trial court, in its original sentencing order, found that "[t]he mitigating factors do not outweigh the aggravating circumstances of killing two or more innocent person during one course of conduct." (C. 289.) Section 13A-5-47(e), Ala. Code 1975, explains, however, that "[i]n deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." (Emphasis added.) Although the trial court's finding was "defective" and subject to harmless-error analysis, this Court, out of an abundance of caution, instructed the trial court to correct this error when it issued its new sentencing order.

virtue of its guilt-phase verdict, found that the State had proved one aggravating circumstance beyond a reasonable doubt --specifically, that Phillips had caused the death of two or more persons by one act or pursuant to one scheme or course of conduct--and set out the statutory and nonstatutory mitigating circumstances it found to exist and what weight it applied to each of those mitigating circumstances. Additionally, the trial court explained to Phillips that it had concluded that the aggravating circumstance of intentionally causing the death of two or more persons pursuant to one act "outweigh[ed] any mitigating circumstances determined to exist and considered in this case" (Record on Return to Remand, R. 44), adjudicated Phillips guilty of capital murder, and pronounced in open court that Phillips be sentenced to death.

After the trial court made return to this Court, Phillips, on March 15, 2016, filed in this Court a "motion for leave to file brief on return to remand," which we granted.[2]

[2]At the time this case was resubmitted to this Court on return to remand, there existed no mechanism in the Alabama Rules of Appellate Procedure for filing a brief on return to remand. On September 20, 2016, the Alabama Supreme Court adopted Rule 28A, Ala. R. App. P., effective January 1, 2017. The Committee Comments to that rule explain:

In his brief on return to remand, Phillips contends: (1) that Phillips's "death sentence must be vacated in light of Ring v. Arizona[, 536 U.S. 584 (2002),] and Hurst v. Florida"; (2) that the "trial court's requirement of a causal connection between the mitigating circumstances and the offense violates state and federal law"; (3) that the "trial court's refusal to find and consider uncontested mitigating circumstances violated state and federal law"; (4) that the "trial court considered non-statutory aggravation in sentencing [Phillips] to death in violation of state and federal law"; (5) that the

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> "Rule 28A provides a mechanism for the parties to file supplemental briefs when the case has been remanded to the trial court with instructions for the trial court to make findings and to make a return to the appellate court. In an appropriate case, the appellate court may direct that the parties not be permitted to file supplemental briefs.
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> "Supplemental briefing is not required in all cases when there has been a remand to the trial court. Unless otherwise directed by the court, the parties need not file supplemental briefs on return to remand if the issues presented by the remand proceedings are adequately covered by the original briefs. It is recommended that, if no supplemental brief (or responsive brief) is to be filed, the party who would be filing the brief notify the appellate court in writing of that fact as soon as possible."

"prosecutor improperly asserted that, based on his expertise, this case was a death penalty case, in violation of state and federal law"; and (6) that the "jury was incorrectly informed that its penalty phase verdict was merely a recommendation, in violation state and federal law." We address each of Phillips's issues in turn.

I.

Phillips contends that his "death sentence must be vacated in light of Ring v. Arizona and Hurst v. Florida." (Phillips's brief on return to remand, p. 4.) According to Phillips, "[u]nder the holding in Hurst, Alabama's death penalty scheme is unconstitutional and [his] sentence of death must be vacated" because, he says, (1) "the ultimate decision to sentence a defendant to death is made by a court and not a jury"; (2) "[t]he ultimate determination of whether aggravating circumstances outweigh mitigating circumstances is made by a court and not a jury"; (3) "[f]indings about aggravating circumstances that are necessary to impose death are independently made by a court and not a jury"; and (4) "Hurst overruled precedent previously used to find Alabama's death penalty statute constitutional"--namely, Hildwin v.

Florida, 490 U.S. 638 (1989), and Spaziano v. Florida, 468 U.S. 447 (1984).

In State v. Billups, [Ms. CR-15-0619, June 17, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016), this Court addressed the constitutionality of Alabama's capital-punishment scheme in light of Hurst and, in doing so, rejected the arguments Phillips raises in his brief on return to remand. Specifically, in Billups we summarized Hurst as follows:

> "In Hurst, the United States Supreme Court held Florida's capital-sentencing scheme unconstitutional. The Court noted that '[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's.' Hurst, 577 U.S. at ___, 136 S. Ct. at 621–22. Florida's capital-sentencing scheme as it then existed was similar to Arizona's in that the maximum sentence authorized by a jury verdict finding a defendant guilty of first-degree murder was life imprisonment without the possibility of parole; the defendant became eligible for the death penalty only if the trial court found the existence of an aggravating circumstance and found that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Although Florida's procedure, unlike Arizona's, included an advisory verdict by a jury recommending a sentence, the Court found this distinction 'immaterial' because a Florida jury '"does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge[; therefore, a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."' Hurst,

> 577 U.S. at ___, 136 S. Ct. at 622 (quoting Walton [v. Arizona], 497 U.S. [639] at 648, 110 S. Ct. 3047 [(1990)]). The Court reiterated that 'any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" ... must be submitted to a jury,' Hurst, 577 U.S. at ___, 136 S. Ct. at 621 (emphasis added), and concluded that Florida's procedure was unconstitutional because 'the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death,"' Hurst, 577 U.S. at ___, 136 S. Ct. at 622 (quoting former Fla. Stat. § 785.082(1)(a)); '[t]he trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."' Hurst, 577 U.S. at ___, 136 S. Ct. at 622 (quoting former Fla. Stat. § 921.141(3).) As in Ring, in which the Court overruled its previous decision in Walton upholding Arizona's capital-sentencing scheme, the Court in Hurst overruled its previous decisions in Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), upholding as constitutional Florida's capital-sentencing scheme to the extent 'they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, 577 U.S. at ___, 136 S. Ct. at 624 (emphasis added)."

Billups, ___ So. 3d at ___ (footnote omitted). We further explained:

> "Hurst did not ... hold unconstitutional the broad overall structure of Florida's capital-sentencing scheme--a hybrid scheme beginning with a bifurcated capital trial during which the jury first determines

whether the defendant is guilty of the capital offense and then recommends a sentence, followed by the trial court making the ultimate decision as to the appropriate sentence. Rather, the Court held that Florida's capital-sentencing scheme was unconstitutional to the extent that it specifically conditioned a capital defendant's eligibility for the death penalty on findings made by the trial court and not on findings made by the jury, which contravened the holding in Ring. The Court emphasized several times in its opinion that Florida's capital-sentencing statutes did not make a capital defendant eligible for the death penalty until the trial court made certain findings. See Former Fla. Stat. § 775.082(1)(a) (2010) ('[A] person who has been convicted of a capital felony shall be punished by death' only 'if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.' (emphasis added)). And the Court held only that 'Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.' Hurst, 577 U.S. at ___, 136 S. Ct. at 624.

"The Court in Hurst did nothing more than apply its previous holdings in Apprendi[v. New Jersey, 530 U.S. 466 (2000),] and Ring to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. As the State correctly argues, 'Hurst did not add anything of substance to Ring.' (Petitions, p. 6.) The Alabama Supreme Court has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring. See, e.g., Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002); Ex parte Hodges, 856 So. 2d 936 (Ala. 2003); Ex parte Martin,

> 931 So. 2d 759 (Ala. 2004); Ex parte McNabb, 887 So. 2d 998 (Ala. 2004); and Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004). ..."

Billups, ___ So. 3d at ___. Thereafter, we analyzed Alabama's capital-sentencing scheme and summarized Hurst's impact on Alabama's capital-sentencing scheme:

> "In sum, under Alabama's capital-sentencing scheme, a capital defendant is not eligible for the death penalty unless the jury unanimously finds beyond a reasonable doubt, either during the guilt phase or during the penalty phase of the trial, that at least one of the aggravating circumstances in § 13A-5-49 exists. Unlike both Arizona and Florida, which conditioned a first-degree-murder defendant's eligibility for the death penalty on a finding by the trial court that an aggravating circumstance existed, Alabama law conditions a capital defendant's eligibility for the death penalty on a finding by the jury that at least one aggravating circumstance exists. If the jury does not unanimously find the existence of at least one aggravating circumstance, the trial court is foreclosed from sentencing a capital defendant to death. If the jury unanimously finds that at least one aggravating circumstance does exist, then the trial court must proceed to determine the appropriate sentence. Although the trial court in Alabama must also make findings of fact regarding the existence or nonexistence of aggravating circumstances, the trial court's findings are not the findings that render a capital defendant eligible for the death penalty, as was the case in Ring and Hurst. Under Alabama law, only a jury's finding that an aggravating circumstance exists will expose a capital defendant to the death penalty.
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> "Alabama's capital-sentencing scheme, unlike the schemes held unconstitutional in Ring and Hurst,

> does not 'allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, ___ U.S. at ___, 136 S. Ct. at 624; accord Ring, 536 U.S. at 609, 122 S. Ct. 2428. Because in Alabama it is the jury, not the trial court, that makes the critical finding necessary for imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst."

Billups, ___ So. 3d at ___.

Here, as explained above, the jury found Phillips guilty of one count of capital murder for causing the death of Erica and Baby Doe during "one act or pursuant to one scheme or course of conduct." See § 13A-5-40(a)(10), Ala. Code 1975. That capital offense includes as an element of the offense the aggravating circumstance of "intentionally caus[ing] the death of two or more persons by one act or pursuant to one scheme or course of conduct." See § 13A-5-49(9), Ala. Code 1975. As we explained in Billups:

> "'Many capital offenses listed in Ala. Code 1975, § 13A-5-40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A-5-49.' Ex parte Waldrop, 859 So. 2d at 1188. As noted above, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.' § 13A-5-45(e). When the capital offense itself includes as an element one of the aggravating circumstances in §

> 13A-5-49 (often referred to as 'overlap'), the jury will make the finding that an aggravating circumstance necessary for imposition of the death penalty exists during the guilt phase of the trial. In those cases, the maximum sentence a defendant convicted of a capital offense may receive based on the jury's guilty verdict alone is death, and Apprendi, Ring, and Hurst are satisfied because the jury's guilt-phase verdict necessarily includes the finding of an aggravating circumstance necessary for imposition of the death penalty."

___ So. 3d at ___.

Thus, in this case, the jury's guilt-phase verdict also established that an aggravating circumstance was proved beyond a reasonable doubt, and the maximum sentence Phillips could receive based on the jury's guilt-phase verdict alone was death. Accordingly, "the jury, not the trial court, ... [made] the critical finding necessary for imposition of the death penalty," and Phillips is not entitled to relief on this claim. See also Ex parte Bohannon, [Ms. 1150640, Sept. 30, 2016] ___ So. 3d ___ (Ala. 2016) (holding that Alabama's capital-sentencing scheme "is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment" and rejecting the "argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), and Hildwin v. Florida,

490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme").

II.

Phillips contends the trial court's amended sentencing order "improperly required a causal connection between the mitigating circumstances presented by Mr. Phillips and the offense." (Phillips's brief on return to remand, p. 17.) Specifically, Phillips argues:

> "In the trial court's amended sentencing order ... the trial court rejected the mitigating circumstances of the repeated violence and neglect in Mr. Phillips's childhood, solely because Mr. Phillips had not established a causal relationship to the offense. Specifically, the trial court found '[t]he Court has heard hundreds if not thousands, of cases of drug abuse, neglect, and domestic violence over the last twenty years, but capital murder does not naturally result as a factor from a bad childhood.' (CR. 98.) Nowhere in the amended sentencing order did the trial court consider whether this powerful mitigation offered by Mr. Phillips 'might serve as a basis for a sentence less than death,' Tennard[v. Dretke], 542 U.S. [274] at 288 [(2004)]; rather, the court dismissed this evidence outright because the mitigating factors did not 'naturally result' in or cause the offense. (CR. 98)."

(Phillips's brief on return to remand, pp. 17-18 (footnote omitted; emphasis added).)

This Court in its opinion on original submission rejected Phillips's argument regarding identical language in the trial court's original sentencing order, see Phillips v. State, ___ So. 3d at ___ ("[H]ere, the trial court's finding that 'Capital Murder does not naturally result as a factor from a bad childhood' is not error."). Phillips's reiteration of the claim in his brief on return to remand--that the trial court, in its amended sentencing order, "rejected the mitigating circumstances of the repeated violence and neglect in [his] childhood, solely because [he] had not established a causal relationship to the offense"--is clearly refuted by the record.

Indeed, although Phillips quotes the portion of the trial court's amended sentencing order in which it explained that "capital murder does not naturally result as a factor from a bad childhood," Phillips omits from his argument the sentence that immediately follows the trial court's "naturally results" statement--specifically, the trial court explained that it "finds these mitigating circumstances to exist, and gives this

terrible background some weight." (Record on Return to Remand, C. 98 (emphasis added).) Thus, contrary to Phillips's assertion in his brief on return to remand, the trial court did not either "reject" or "dismiss" this mitigating circumstance; it found it to exist and gave it "some weight." Accordingly, Phillips is not entitled to any relief on this claim.

III.

Phillips contends that the trial court, in its amended sentencing order, "improperly refused to find and consider uncontested mitigating circumstances." (Phillips's brief on return to remand, p. 19.) Specifically, Phillips explains:

> "In this case, it was uncontested that the incident occurred during a heated argument (R. 543-44); that, coupled with evidence of Mr. and Mrs. Phillips's emotionally turbulent relationship (C. 190-91), established the statutory mitigating circumstance of 'extreme mental or emotional disturbance.' Ala. Code § 13A-5-51(2). Mr. Phillips said that he and Mrs. Phillips were arguing for most of the day and that their fight became heated when Mrs. Phillips, a white woman, used racial slurs against Mr. Phillips, an African American man. (C. 163, 165-66, 171-72, 177, 178-79.) Mr. Phillips also said that the incident happened quickly and impulsively. (C. 179-80, 185- 88.) The State offered nothing to rebut this evidence of Mr. Phillips's emotional distress during the incident. (R. 838.) However, in the trial court's amended sentencing order, the court found that this mitigating

> circumstance did not exist and refused to consider it. (CR. 96.)"

(Phillips's brief on return to remand, p. 21 (emphasis added).) According to Phillips, "Alabama law ... requires the trial court to consider all relevant mitigating evidence, Ala. Code § 13A-5-52, and provides that once the defendant interjects a mitigating circumstance, if the State does not disprove its factual existence by a preponderance of the evidence, the sentencer must find it exists." (Phillips's brief on return to remand, p. 20.)

In other words, Phillips contends that, under Alabama law, the trial court was required both (1) to consider the evidence he presented to demonstrate the statutory mitigating circumstance that he killed Erica and Baby Doe while he "was under the influence of extreme mental or emotional disturbance," see § 13A-5-51(2), Ala. Code 1975, and (2) to find that statutory mitigating circumstance to exist.

We rejected this argument in our opinion on original submission and explained that Phillips's argument "'is that a trial court's failure to find a mitigating circumstance based on certain mitigating evidence necessarily means that the trial court did not consider that mitigating evidence.

[Phillips] thus conflates the concept of considering mitigating evidence with finding that a mitigating circumstance actually exists in a particular case. This argument has been rejected.'" Phillips, ___ So. 3d at ___ (quoting Stanley v. State, 143 So. 3d 230, 331 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court)).

> "In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the United States Supreme Court held that in a capital case, the sentencer--the trial court in this case--may not 'be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' 438 U.S. at 604, 98 S. Ct. 2954. See also Eddings v. Oklahoma, 455 U.S. 104, 113–14, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (noting that 'the State may not by statute preclude the sentencer from considering any mitigating factor').
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> "In Thompson v. State, [153] So. 3d [84], [189] (Ala. Crim. App. 2012), this Court stated:
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> "'"'While Lockett [v. Ohio, 438 U.S. 586 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.'" Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996) (quoting Bankhead v.

> State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989)). "The weight to be attached to the ... mitigating evidence is strictly within the discretion of the sentencing authority." Smith v. State, 908 So. 2d 273, 298 (Ala. Crim. App. 2000).'"

Stanley v. State, 143 So. 3d 230, 330 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court). In other words, under Alabama law, although a trial court is required to consider all evidence proffered as mitigation, a trial court is not required to find that a mitigating circumstance exists simply because evidence is proffered to the trial court in support of that circumstance.

Although Phillips correctly contends that the trial court did not find the statutory mitigating circumstance of "extreme mental or emotional disturbance" to exist, Phillips's assertion that the trial court refused to consider the evidence he presented to establish the statutory mitigating circumstance that he killed Erica while he "was under the influence of extreme mental or emotional disturbance" is clearly refuted by the record.

Here, the trial court, in the section of its amended sentencing order addressing the statutory mitigating circumstances, found:

> "(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Phillips claims that he was laboring with emotional disturbance. The only evidence on this issue came from his confession to the Guntersville police that he killed Erica 'because he lost it,' and that Erica belittled him and at time called him racial names. The Court notes that none of the name-calling would prove extreme or mental disturbance as required by law. As such, while emotional disturbance was alleged, the Court deems that a mitigating factor for 'extreme mental or emotional disturbance' does not exist and gives this circumstance no weight."

(Record on Return to Remand, C. 96 (emphasis in original).) Thus, contrary to Phillips's assertion in his brief on return to remand, the trial court did, in fact, consider the evidence Phillips proffered to establish the statutory mitigating circumstance of "extreme mental or emotional disturbance." Although the trial court did not find that statutory mitigating circumstance to exist, it was not required to do so. Thus, Phillips is not entitled to relief on this claim.

Additionally, Phillips contends that, "[e]ven if this evidence [of extreme mental or emotional disturbance] did not rise to the level of a statutory mitigating circumstance, the

court was required, under state and federal law, to find and consider the circumstances surrounding the offense as non-statutory mitigating circumstances." (Phillips's brief on return to remand, pp. 21-22.) In making this argument, Phillips again "conflates the concept of considering mitigating evidence with finding that a mitigating circumstance actually exists in a particular case." Additionally, Phillips incorrectly asserts that, if a trial court does not find evidence offered in mitigation to fall under the purview of one of the enumerated statutory mitigating circumstances, the trial court is required to find that the mitigating evidence is a nonstatutory mitigating circumstance. No such requirement exists.

As explained above, the trial court is required only to consider evidence presented as mitigation and has the discretion to decide whether a particular mitigating circumstance exists and what weight, if any, is to be given to that mitigating circumstance. See Stanley, 143 So. 3d at 329 ("'It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer, in this case,

the trial court; although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. Cochran v. State, 500 So. 2d 1161 (Ala. Crim. App. 1984), aff'd in pertinent part, remanded on other part, 500 So. 2d 1179 (Ala. 1985), aff'd on return to remand, 500 So. 2d 1188 (Ala. Cr. App.), aff'd 500 So. 2d 1064 (Ala. 1986), cert. denied, 481 U.S. 1033, 107 S. Ct. 1965, 95 L. Ed.2d 537 (1987).'") (quoting Spencer v. State, 58 So. 3d 215, 255 (Ala. Crim. App. 2008) (opinion on return to second remand)).

Here, as explained above, the trial court clearly considered Phillips's proffered mitigation evidence that he killed Erica and Baby Doe "during a heated argument and that Mr. Phillips was in a heightened emotional state triggered by [Erica's] use of racial slurs." (Phillips's brief on return to remand, p. 22.) Indeed, the trial court detailed this evidence when it concluded that it was not a statutory mitigating circumstance. (Record on Return to Remand, C. 96.) Although the trial court did not mention this proffered evidence in the portion of its amended sentencing order

addressing Phillips's nonstatutory mitigating circumstances, the trial court was not required to do so.

> "In Ex parte Lewis, 24 So. 3d 540 (Ala. 2009), the Alabama Supreme Court stated:
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> > "'In Clark v. State, 896 So. 2d 584 (Ala. Crim. App. 2000), the Court of Criminal Appeals conducted a proper review of a trial court's failure to find that proffered evidence constituted a mitigating circumstance, stating, in pertinent part:
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> > > "'"The sentencing order shows that the trial court considered all of the mitigating evidence offered by Clark. The trial court did not limit or restrict Clark in any way as to the evidence he presented or the arguments he made regarding mitigating circumstances. In its sentencing order, the trial court addressed each statutory mitigating circumstance listed in § 13A-5-51, Ala. Code 1975, and it determined that none of those circumstances existed under the evidence presented. Although the trial court did not list and make findings as to the existence or nonexistence of each nonstatutory mitigating circumstance offered by Clark, as noted above, such a listing is not required, and the trial court's not making such findings indicates only that the trial court found the offered evidence not to be mitigating, not that the trial court did not consider this evidence. Clearly,

> the trial court considered Clark's proffered evidence of mitigation but concluded that the evidence did not rise to the level of a mitigating circumstance. The trial court's findings in this regard are supported by the record.
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> "'"Because it is clear from a review of the entire record that the trial court understood its duty to consider all the mitigating evidence presented by Clark, that the trial court did in fact consider all such evidence, and that the trial court's findings are supported by the evidence, we find no error, plain or otherwise, in the trial court's findings regarding the statutory and nonstatutory mitigating circumstances."
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> "896 So. 2d at 652–53 (emphasis added).'
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> "Ex parte Lewis, 24 So. 3d at 545. As Lewis and Clark establish, a trial court is not required to make an itemized list of the evidence it finds does not rise to the level of nonstatutory mitigating circumstances."

Stanley, 143 So. 3d at 328-29 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court).

Here, the trial court was clearly aware of its duty to consider all the mitigating evidence presented by Phillips. Additionally, the trial court, in its amended sentencing

order, listed each statutory mitigating circumstance and found only one to exist--that Phillips had no significant criminal history. Although the trial court did not mention all of Phillips's proffered nonstatutory mitigating circumstances in the portion of its amended sentencing order addressing those nonstatutory mitigating circumstances it found to exist, the trial court's "not making such findings indicates only that [the trial court] found the offered evidence not to be mitigating, not that [the trial court] did not consider this evidence." Stanley, 143 So. 3d at 329 (internal quotation marks omitted).

Phillips also contends that the trial court "failed to consider additional uncontested" nonstatutory mitigating circumstances, including: (1) that Phillips "turned himself in and fully cooperated with police"; (2) that Phillips "was at the police station no more than fifteen minutes after the incident occurred to turn himself in"; (3) that Phillips "gave two separate statements to the police, the first one less than an hour after the incident occurred, in which he accepted responsibility and answered all of the investigator's questions"; and (4) that Phillips "was exposed to sexual abuse

of his sisters when he was a child." (Phillips's brief on return to remand, p. 22.) According to Phillips, "the trial court failed to find, consider, or even list these facts in the amended sentencing order." (Phillips's brief on return to remand, p. 23.)

Although the trial court did not "list" this mitigating evidence in the section of its amended sentencing order addressing nonstatutory mitigating evidence, as set out above, the trial court is not required to do so. Additionally, as explained above, the trial court was not required to "find" this evidence to be mitigating; rather, the trial court was required only to "consider" the evidence.

Here, the record on return to remand clearly demonstrates that the trial court "considered" the above-listed evidence as mitigation. Indeed, at the judicial sentencing hearing conducted on January 13, 2016, Phillips's counsel explained to the trial court what evidence he believed was proffered as mitigation. Specifically, Phillips's counsel explained:

> "Phillips had no significant criminal history prior to this point, had a history of gainful employment, and [his] mother also testified that she achieved sobriety in her life because of his support.

> "Also mitigating that, following this tragic crime, Mr. Phillips turned himself in to police, fully cooperated with the investigation, gave two full statements. He accepted responsibility. That in and of itself is also mitigating."

(Supplemental Record on Return to Remand, R. 19.) Additionally, Phillips's counsel explained that Phillips's "childhood was plagued with repeated neglect; exposure to domestic violence, sexual abuse, and drugs; multiple placements in foster care as young as 12. His mother struggled with substance abuse." (Supplemental Record on Return to Remand, R. 18.) According to Phillips's counsel, although no evidence of sexual abuse was presented to the jury, it was mentioned in the pre-sentence investigation report completed by Jeremy Colvin.

The trial court, in its amended sentencing order, detailed Phillips's cooperation with law enforcement; how quickly Phillips turned himself in to law enforcement; and the facts that Phillips gave statements to law enforcement and took responsibility for the offense. Additionally, the trial court acknowledged that Phillips presented testimony from his mother "who talked of Phillips and his sister being removed from her and her drug problems. Phillips spent a large part of

his life in foster care, and, as an adult, he helped his mother get off drugs." (Record on Return to Remand, C. 93.) Furthermore, the trial court explained that neither Phillips nor the State "objected or requested to submit additions to the sentencing investigation report done by Jeremy Colvin, Adult Probation Officer" (Record on Return to Remand, C. 93), which report included a statement that Phillips "was placed in foster care several times due to investigations of sexual abuse [by various family members and non-family members] towards his sisters." (C. 284.)

Before reweighing the aggravating circumstances and the mitigating circumstances in its amended sentencing order, the trial court determined that Phillips's lack of significant criminal history was a statutory mitigating circumstance and gave it "weight"; that Phillips's "terrible background" was a nonstatutory mitigating circumstance and gave it "some weight"; that Phillips helping his mother overcome a drug addiction was a nonstatutory mitigating circumstance and gave it "some weight"; and that it considered "mercy" to be a nonstatutory mitigating circumstance and gave it "weight." Thus, in determining the existence or nonexistence of both

statutory and nonstatutory mitigating circumstances, the trial court clearly considered all the evidence presented by Phillips. Accordingly, Phillips is not entitled to any relief on this claim. See Stanley, supra.

IV.

Phillips contends that the trial court, in its amended sentencing order, "improperly considered non-statutory aggravation when sentencing [him] to death." (Phillips's brief, p. 23.) Specifically, Phillips contends that the trial court considered "nonstatutory" aggravating circumstances because, he says,

> "[i]n the 'Aggravating Circumstances' section of the amended sentencing order, the trial court found that Mr. Phillips deserved the death penalty because: 1) 'an unborn baby [is] a life worthy of respect and protection' 2) '[t]he Founding Fathers of this nation recognized all life as worthy of respect and due process of law' and 3) '[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court,' implying that the death penalty would provide 'due process' to the victims. (CR. 95.) None of these facts are listed as permissible aggravating circumstances in Section 13A-5-49[, Ala. Code 1975.]"

(Phillips's brief on return to remand, pp. 24-25.)

Phillips made this precise argument in his brief on original submission, which challenged language in the trial

court's original sentencing order that is identical to language in its amended sentencing order. This Court rejected Phillips's claim on original submission. We noted:

> "Phillips contends that,
>
> > "'[i]n the "Aggravating Factors" section of the sentencing order, the trial court found that Mr. Phillips deserved the death penalty because: 1) "an unborn baby [is] a life worthy of respect and protection" 2) "[t]he founding fathers of this nation recognize[d] all life as worthy of respect and due process of law" and 3) "[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court," implying that the death penalty would provide "due process" to the victims.'
>
> "(Phillips's brief, p. 69.)
>
> "Here, contrary to Phillips's assertion, the trial court did not consider nonstatutory aggravating circumstances when it imposed his sentence. Rather, the trial court recognized that there was only one aggravating circumstance--murder of two or more persons by one act--and, thereafter, weighed that aggravating circumstance by commenting on the 'clear legislative intent to protect even nonviable fetuses from homicidal acts,' Mack[v. Carmack], 79 So. 3d [597] at 610 [(Ala. 2011)], and the severity of the crime. Such commentary does not amount to the trial court's considering a nonstatutory aggravating factor. See, e.g., Scott v. State, 163 So. 3d 389, 469 (Ala. Crim. App. 2012) ('It is clear that the above comment was a reference to the severity of the murder and was not the improper application of a nonstatutory aggravating circumstance.')."

Phillips, ___ So. 3d at ___.

Based on the reasons set forth in our opinion on original submission, we again reject Phillips's claim that the trial court considered nonstatutory aggravating circumstances when it sentenced Phillips to death. Accordingly, Phillips is not entitled to any relief on this claim.

V.

Phillips contends that, during the judicial sentencing hearing conducted on remand, "the prosecutor improperly asserted [to the trial court] that, based on his expertise, this case was a death penalty case, in violation of state and federal law." (Phillips's brief on return to remand, p. 25.)

To support his position, Phillips cites Guthrie v. State, 616 So. 2d 914 (Ala. Crim. App. 1993), Arthur v. State, 575 So. 2d 1165 (Ala. Crim. App. 1990), Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), United States v. Young, 470 U.S. 1 (1985), and Berger v. United States, 295 U.S. 78 (1935). Those cases, however, do not stand for the proposition that it is improper for a prosecutor to argue to the trial court that, "based on his expertise," a certain case warrants the death penalty. Those cases, instead, stand for the proposition that

> "[i]n our adversarial system of criminal justice, a prosecutor seeking a sentence of death may properly argue to the jury that a death sentence is appropriate. See Hall v. State, 820 So. 2d 113, 143 (Ala. Crim. App. 1999). On the other hand, it is impermissible for a prosecutor to urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence. See Guthrie [v. State], 616 So. 2d [914] at 931–32 [(Ala. Crim. App. 1993)] (holding that a prosecutor's statement that '"[w]hen I first became involved in this case, from the very day, the State of Alabama, the law enforcement agencies and everybody agreed that this was a death penalty case, and we still stand on that position"' improperly '[led] the jury to believe that the whole governmental establishment had already determined that the sentence should be death and [invited] the jury to adopt the conclusion of others, ostensibly more qualified to make the determination, rather than deciding on its own')."

Vanpelt v. State, 74 So. 3d 32, 91 (Ala. Crim. App. 2009) (emphasis added). Because the cases Phillips relies on to support his argument prohibit the prosecutor from making certain arguments to the jury and the comments Phillips now contends were inappropriate were made to the trial court, the cases Phillips relies on are inapposite.

Regardless, even if we were to hold that those cases also prohibit a prosecutor from making certain arguments to the trial court (and we do not so hold), Phillips would still not be entitled to any relief on this claim. Indeed, as explained

above, those cases hold that, although a prosecutor may argue that a death sentence is appropriate, a prosecutor cannot urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence.

Here, during the judicial sentencing hearing conducted on January 13, 2016, Phillips's counsel set out for the trial court the mitigating circumstances he alleged would warrant the imposition of a sentence of life imprisonment without the possibility of parole. Thereafter, the following exchange occurred:

> "The Court: Why would this not be--out of the U.S. Supreme Court case Gregg[v. Georgia, 428 U.S. 153 (1976),] it says capital punishment basically says it should be reserved for the most heinous of capital--of murder cases, basically. Is that not right?
>
> "[Phillips's counsel]: Yes, sir.
>
> "The Court: The worst of the worst, I believe they use the wording in the Supreme Court. Why doesn't this case fit? You said this is not the worst of the worst, this is not that type of case. Tell me why.
>
> "[Phillips's counsel]: There's no question. Your Honor, that in every case where there's murder there's tragedy, and murder is tragic and violent, and that is always true. But the Constitution requires this Court to distinguish between the few

> cases where the sentence of death is appropriate and the many cases where it's not. And while the shooting death of Mrs. Phillips and her unborn child are undoubtedly tragic, it's simply not one of the most aggravated cases. Even looking solely at Capital Murder cases from Marshall County, this case is not as aggravated as other cases from this county. In Casey McWhorter's case out of Marshall County that defendant conspired to rob an individual. He waited in his house for hours for him to arrive. He crafted a murder weapon out of a rifle, created a homemade silencer, and then him and his co-defendant shot the victim 11 times.
>
> "In Larry Whitehead's case out of Marshall County he sought out a witness who was going to testify against him at an upcoming trial on theft, and he killed him to prevent him from testifying against him at his theft trial.
>
> "In Rick Belisle's case he hid in a store until it closed, and then he beat the store owner to death with a can of peas and a metal pipe. The Court of Criminal Appeals note that she was caused extreme pain in that. Those cases are much more aggravated, and while there's no question that this is a tragic case--it's always a tragic case when murder happens --but you still have to distinguish between the more heinous crimes and the less, and certainly Mr. Phillips's category is not one of the most heinous crimes deserving death."

(Supplemental Record on Return to Remand, R. 25-28.) In response, the prosecutor argued:

> "Judge, I want to go back if I can and deal a little bit with I think in some ways the irony of defendant's counsel argument on whether or not death is appropriate, and especially in comparison to other Marshall County capital cases, some of which this Court sat as a prosecutor and was aware of the

factual allegations in those. They draw facts and comparisons from Belisle. They draw facts and comparisons from Whitehead. What I think is interesting, Your Honor, is I don't think they're also telling you that those cases are ones that are appropriate ... for the death penalty. Whitehead is still being litigated. Belisle is still being litigated. And I don't know the [Equal Justice Initiative] and the defendant and appellate counsel in those cases, but in each of those it is being argued that those cases are not appropriate for death. And so to the extent that they are offered in comparison, if that's an admission that those cases should be subject to the death penalty, I'm sure the others would like to know that. But Your Honor, that is not the legal position that they are taking on appeal in those particular cases.

"And as it relates to the gravity of this crime itself. Your Honor, I can think of no more heinous act than to take the life of an unborn child through a bullet to a pregnant mother. It obviously is a result of a circumstance that happened in this case. The Alabama Legislature believed that for capital purposes--or excuse me, for murder purposes that the unborn were due protection. That is obviously an issue that is part of the appeal in this case, and the Alabama Court of Criminal Appeals agreed with this Court that that is appropriately the death of two people, as well as appropriately considered for capital consideration.

"Your Honor, I cannot imagine that you could find a more egregious set of facts than to take the life of a child that never had an opportunity to live. That is the very argument that we presented to the Court at the time we argued it in front of the jury for their advisory verdict. That's the very argument we presented to the Court at the time of sentencing, and that is an argument that I believe this Court weighed heavily in its consideration of the aggravators and mitigators in this case.

> "And while I recognize--and this Court has seen the practice of this office--just because a case is charged capital does not mean we've taken the position that death is appropriate in every one of those cases. This is one that is one of those unique circumstances. In my 14 years plus as District Attorney, this is the first death verdict that we have obtained. Part of the reason for that, your Honor, is th unique circumstances, the egregious circumstances in which these two deaths occurred. This Court is not one that sits idly in its consideration of the gravity of the offense that was imposed. Having practiced before this Court now for close to 20 years, I am well aware that this Court considers its role as a jurist of one of greatest importance, that this Court bends over backwards to make sure that the constitutional protections that apply to a defendant are given even to the point of exceeding those, as you did in your discussion of mercy, as you did even in the nature of having this hearing today. Your Honor, I think that you have fully considered all factors, that you have taken all the testimony that we have offered in this case, both from the State and the defense, that you have independently and prior to this weighed those factors and believe that the aggravating factor, the sole aggravating factor in this case, outweighed the mitigators. And Judge, that is the decision that we're asking you to make today."

(Supplemental Record on Return to Remand, R. 37-41.)

Although Phillips contends that the prosecutor, in the above-quoted argument, "ask[ed] the trial court to consider 'the practice of [the district attorney's] office' and not[ed] that this is the 'first death verdict' that the office ha[d] obtained," and further argued "that Mr. Phillips's case is the

one 'unique' case where the prosecutor sought and obtained the death verdict" (Phillips's brief on return to remand, pp. 26-27), the complained-of comments, when viewed in context, are merely arguments as to why the prosecutor believed the death penalty was appropriate in this case and did nothing to urge the trial court to "ignore its penalty-phase role" or to "rely on the fact that [the prosecutor] already determine that death is the appropriate sentence." Accordingly, Phillips is not entitled to any relief on this claim.

VI.

Phillips contends that the State "incorrectly informed [the jury] that its penalty phase verdict was merely a recommendation, in violation of state and federal law." (Phillips's brief on return to remand, p. 27.)

Although this Court has repeatedly rejected such a claim, see, e.g., Albarran v. State, 96 So. 3d 131, 210 (Ala. Crim. App. 2011) ("Alabama courts have repeatedly held that 'the comments of the prosecutor and the instructions of the trial court accurately informing a jury of the extent of its sentencing authority and that its sentence verdict was "advisory" and a "recommendation" and that the trial court

would make the final decision as to sentence does not violate Caldwell v. Mississippi[, 472 U.S. 320 (1985)].' Kuenzel v. State, 577 So. 2d 474, 502 (Ala. Crim. App. 1990) (quoting Martin v. State, 548 So. 2d 488, 494 (Ala. Crim. App. 1988)). See also Ex parte Hays, 518 So. 2d 768, 777 (Ala. 1986); White v. State, 587 So. 2d 1236 (Ala. Crim. App. 1991); Williams v. State, 601 So. 2d 1062, 1082 (Ala. Crim. App. 1991); Deardorff v. State, 6 So. 3d 1205, 1233 (Ala. Crim. App. 2004); Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007)."), Phillips contends that the United States Supreme Court's decision in Hurst "makes clear that the jury should not have been informed that its verdict was merely advisory and that Mr. Phillips's death sentence cannot rest on this recommendation from the jury." (Phillips's brief on return to remand, p. 29.) As explained in Part I of this opinion, however, Hurst did not invalidate Alabama's capital-sentencing scheme, including the jury's "advisory verdict." Thus, Phillips is not entitled any relief on this claim.

VII.

Pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Phillips's capital-murder conviction and sentence of death.

As set out above, Phillips was convicted of one count of capital murder for causing the death of his wife, Erica, and their unborn child during "one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975, and the jury unanimously recommended that Phillips be sentenced to death. After receiving a presentence-investigation report and conducting a judicial sentencing hearing, the trial court followed the jury's advisory recommendation and sentenced Phillips to death. On December 18, 2015, however, this Court issued an opinion affirming Phillips's conviction but remanded the case to the trial court for that court to cure certain defects in its sentencing order. In doing so, the trial court conducted a second judicial sentencing hearing during which the trial court read, in open court, its amended sentencing order and explained to Phillips that, after reweighing the aggravating circumstances and the mitigating circumstances, it was sentencing Phillips to death.

The record does not demonstrate that Phillips's death sentence was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

Additionally, the trial court correctly found that the aggravating circumstance outweighed the mitigating circumstances. The trial court, in its amended sentencing order, found one aggravating circumstance to exist--that Phillips caused the death of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A-5-49(9), Ala. Code 1975--and gave that aggravating circumstance "great weight." (Record on Return to Remand, C. 95.) The trial court then considered each of the statutory mitigating circumstances and found one to exist--that Phillips had no significant history of prior criminal activity, see § 13A-5-51(1), Ala. Code 1975--and gave that statutory mitigating circumstance "weight." (Record on Return to Remand, C. 96.) The trial court also considered the nonstatutory mitigating evidence Phillips presented during the penalty phase of his trial, finding:

> "Jessie Phillips lived his early life in a culture of violence and in the shadow of his

> mother's horrible drug addiction. As a result, he was removed from his mother by the Alabama Department of Human Resources (DHR). The jury heard this evidence and gave it what weight they desired. The Court has heard hundreds, If not thousands, of cases of drug abuse, neglect, and domestic violence over the last twenty years, but capital murder does not naturally result as a factor from a bad childhood. The Court finds these mitigating circumstances to exist, and gives this terrible background some weight.
>
> "Phillips also helped his drug-addicted mother overcome her drug addiction. This is admirable, but it is not a mitigating factor that negates the actions he took in this case. There is a possibility he might help other inmates in prison with addiction problems, as trial counsel argued. But that still does not balance the crime proven here. That Phillips has shown love for his children is also a noted factor, but on the other hand, he murdered their mother and unborn sibling while these children were present. The Court finds these mitigating circumstances to exist, and does give this background some weight.
>
> "Finally, although not required, the Court has considered mercy as a nonstatutory mitigating factor. Although not expressly covered by this statute, mercy has always been a consideration of American criminal law, as seen in our jurisprudence's roots in British law and Biblical doctrine. The Court and jury were able to recognize the mercy factor, and the Court notes that this factor is always an issue as a nonstatutory mitigating factor. The Court considers mercy as a nonstatutory mitigating circumstance to exist and has given it weight."

(Record on Return to Remand, 98 (emphasis added).)

Thereafter, the trial court weighed the statutory aggravating

circumstance and the statutory and nonstatutory mitigating circumstances and concluded that "[t]he aggravating circumstance of killing two or more innocent persons during one course of conduct outweighs any statutory and nonstatutory mitigating circumstance determined to exist and considered in this case." (Record on Return to Remand, C. 99.) Thus, the trial court's amended sentencing order shows that it properly weighed the aggravating circumstances and the mitigating circumstances and that it correctly sentenced Phillips to death. The record supports the trial court's findings.

Additionally, § 13A-5-53(b)(2), Ala. Code 1975, requires this Court to reweigh the aggravating and mitigating circumstances in order to determine whether Phillips's sentence of death is appropriate.

"Section 13A-5-48, Ala. Code 1975, provides:

> "'The process described in Sections 13A-5-46(e)(2), 13A-5-46(e)(3) and Section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper

> sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.'
>
> "'The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation.' Ex parte Clisby, 456 So. 2d 105, 108-09 (Ala. 1984). '[W]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party.' Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990). ... 'The weight to be attached to the aggravating and the mitigating evidence is strictly within the discretion of the sentencing authority.' Smith v. State, 908 So. 2d 273, 298 (Ala. Crim. App. 2000)."

Stanley, 143 So. 3d at 333. As explained above, the trial court gave very little weight to the statutory and nonstatutory mitigating circumstances it found to exist, in light of the aggravating circumstance. We agree with the trial court's findings and, after independently weighing the aggravating circumstances and the mitigating circumstances, this Court holds that Phillips's sentence of death is, in fact, appropriate.

As required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must now determine whether Phillips's sentence is excessive or disproportionate when compared to the penalty

imposed in similar cases. In this case, Phillips was convicted of capital murder for causing the death of his wife, Erica, and their unborn child during "one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975.

> "Similar crimes have been punished by death on numerous occasions. See, e.g., Pilley v. State, 930 So. 2d 550 (Ala. Crim. App. 2005) (five deaths); Miller v. State, 913 So. 2d 1148 (Ala. Crim. App.), opinion on return to remand 913 So. 2d 1154 (Ala. Crim. App. 2004) (three deaths); Apicella v. State, 809 So. 2d 841 (Ala. Crim. App. 2000), aff'd, 809 So. 2d 865 (Ala. 2001), cert. denied, 534 U.S. 1086, 122 S. Ct. 824, 151 L. Ed. 2d 706 (2002) (five deaths); Samra v. State, 771 So. 2d 1108 (Ala. Crim. App. 1999), aff'd, 771 So. 2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S. Ct. 317, 148 L. Ed. 2d 255 (2000) (four deaths); Williams v. State, 710 So. 2d 1276 (Ala. Crim. App.), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S. Ct. 2325, 141 L. Ed. 2d 699 (1998) (four deaths); Taylor v. State, 666 So. 2d 36 (Ala. Crim. App.), on remand, 666 So. 2d 71 (Ala. Crim. App. 1994), aff'd, 666 So. 2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S. Ct. 928, 133 L. Ed. 2d 856 (1996) (two deaths); Siebert v. State, 555 So. 2d 772 (Ala. Crim. App.), aff'd, 555 So.2d 780 (Ala. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3297, 111 L. Ed. 2d 806 (1990) (three deaths); Holladay v. State, 549 So. 2d 122 (Ala. Crim. App. 1988), aff'd, 549 So. 2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S. Ct. 575, 107 L. Ed. 2d 569 (1989) (three deaths); Fortenberry v. State, 545 So. 2d 129 (Ala. Crim. App. 1988), aff'd, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1937, 109 L. Ed. 2d 300 (1990) (four deaths); Hill v. State, 455 So. 2d 930 (Ala. Crim. App.), aff'd, 455 So. 2d 938 (Ala.),

> cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984) (three deaths)."

Stephens v. State, 982 So. 2d 1110, 1147–48 (Ala. Crim. App. 2005), rev'd on other grounds, Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006). See also Reynolds v. State, 114 So. 3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So. 3d 997 (Ala. Crim. App. 2007). Therefore, this Court holds that Phillips's death sentence is neither excessive nor disproportionate.

Lastly, this Court has searched the entire record for any error that may have adversely affected Phillips's substantial rights and has found none. See Rule 45A, Ala. R. App. P.

Accordingly, Phillips's conviction and sentence of death are due to be affirmed.

AFFIRMED AS TO SENTENCING.

Windom, P.J., and Welch, J., concur. Burke, J., recuses himself. Kellum, J., not sitting.